

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CV-552-FL

ANITA THOMAS,

Plaintiff,

v.

CUMBERLAND COUNTY BOARD OF
EDUCATION; VANSTORY HILLS
ELEMENTARY SCHOOL; and BETTY
MUSSELWHITE, Principal,

Defendants.

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ORDER

This matter comes before the court upon the memorandum and recommendation (“M&R”) filed on March 30, 2011, by United States Magistrate Judge David W. Daniel, pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b). The magistrate judge granted plaintiff’s motion for leave to proceed *in forma pauperis*, but recommended dismissing this action as frivolous under 28 U.S.C. § 1915(e). The magistrate judge noted that plaintiff previously filed a similar lawsuit against the same defendants, Thomas v. Cumberland County Schools, No. 5:09-CV-359-FL (E.D.N.C. filed Aug. 17, 2009), and concluded that *res judicata* accordingly bars the instant suit.

Plaintiff objected to the M&R in filing dated April 12, 2011. Plaintiff notes that this court concluded that the joint stipulation of dismissal in her previous Title VII discrimination case expressly carved out an exception for her Title VII retaliation claim, which is what she seeks to assert here. Plaintiff argues that *res judicata* is accordingly not appropriate, because the parties agreed that plaintiff would be able to bring this lawsuit once administratively exhausted.

Upon *de novo* review, see 28 U.S.C. § 636(b), the court agrees with plaintiff that it would be inappropriate to dispose of this case under § 1915(e). Although it is acceptable in rare circumstances for the court to raise the affirmative defense of *res judicata* on its own initiative, see Arizona v. California, 530 U.S. 392, 412-13 (2000), plaintiff has raised a colorable argument that the voluntary stipulation of dismissal entered into in her previous case contains an express waiver of *res judicata* as to the Title VII retaliation claim she seeks now to assert in this lawsuit. Thus, the court finds it appropriate to allow plaintiff to proceed with this action.

Therefore, for the reasons set forth above, the court declines to adopt the recommendation of the magistrate judge. It does not clearly appear from the face of the complaint that plaintiff is not entitled to relief, thus the matter is ALLOWED to proceed. The Clerk of Court is DIRECTED to issue summonses for defendants.

SO ORDERED, this the 17th day of May, 2011.


LOUISE W. FLANAGAN
Chief United States District Judge